No. 94-642

Supreme Court, U.S.
FILED
JAN 9 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LARRY EUGENE MOORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the private residence involved in this case was used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i).

2. Whether the district court erred in admitting evidence of a witness's prior consistent statement for the limited purpose of rehabilitating that witness's credibility after it had been impeached on cross-examination.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Russell v. *United States*, 471 U.S. 858 (1985)	5, 6
United States v. *Brennan*, 798 F.2d 581 (2d Cir. 1986)	8, 9
United States v. *Casoni*, 950 F.2d 893 (3d Cir. 1991)	8
United States v. *DeMarrias*, 876 F.2d 674 (8th Cir. 1989)	8
United States v. *Harris*, 761 F.2d 394 (7th Cir. 1985)	8
United States v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981)	6
United States v. *Miller*, 874 F.2d 1255 (9th Cir. 1989)	9
United States v. *Parodi*, 703 F.2d 768 (4th Cir. 1983)	8
United States v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), petition for cert. pending, No. 94-5755	4, 5, 7
United States v. *Ryan*:	
9 F.3d 660 (1993), aff'd in part, reinstated in part, No. 92-1357 (8th Cir. Oct. 31, 1994) (en banc)	7
No. 92-1357 (8th Cir. Oct. 31, 1994) (en banc)	7
United States v. *Stillwell*, 900 F.2d 1104 (7th Cir.), cert. denied, 498 U.S. 838 (1990)	5, 6, 7
Youakim v. *Miller*, 425 U.S. 231 (1976)	9

Constitution, statutes and rules:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause)	5, 7
18 U.S.C. 2	2
18 U.S.C. 371	2
18 U.S.C. 844(h)(1)	2
18 U.S.C. 844(i)	2, 3, 4, 5, 6, 7

Statutes and rules—Continued: Page

18 U.S.C. 1341 2
Fed. R. Evid.:
Rule 402 9
Rule 801(c) 8
Rule 801(d)(1)(B) 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-642

LARRY EUGENE MOORE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is unpublished, but the judgment is noted at 25 F.3d 1042 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1994. A petition for rehearing was denied on July 8, 1994. Pet. App. 12-13. The petition for a writ of certiorari was filed on October 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiring to violate the federal arson statute, to commit mail fraud, and to use fire to commit a felony, in violation of 18 U.S.C. 371; five counts of mail fraud and of aiding and abetting that crime, in violation of 18 U.S.C. 1341 and 2; two counts of violating the federal arson statute and of aiding and abetting that crime, in violation of 18 U.S.C. 844(i) and 2; and two counts of using fire to commit a felony and of aiding and abetting that crime, in violation of 18 U.S.C. 844(h)(1) and 2. Petitioners Moore and McLamb were each convicted on one additional count of violating the federal arson statute and of aiding and abetting that crime, in violation of 18 U.S.C. 844(i) and 2, and one additional count of using fire to commit a felony and of aiding and abetting that crime, in violation of 18 U.S.C. 844(h)(1) and 2. Petitioner Moore was sentenced to 48 months' imprisonment, to be followed by three years of supervised release, and ordered to pay $1,675,420.71 in restitution. Petitioner McLamb was sentenced to 30 months' imprisonment, to be followed by three years of supervised release, and ordered to pay $1,675,420.71 in restitution. Petitioner Gregory was sentenced to 84 months' imprisonment, to be followed by three years of supervised release. Pet. App. 14-37. The court of appeals affirmed. *Id.* at 1-11.

1. Daniel A. Vogel wanted to burn down his house in Myrtle Beach, South Carolina, so that he could collect the proceeds of his fire insurance. Vogel contacted petitioner Moore and asked him to find someone to burn down the house. Moore was in business with petitioner McLamb and Charles Terry Norman, and the three of

them agreed to burn down the house for $100 ?00. Gov't C.A. Br. 4.

Moore, McLamb, and Norman attempted to burn down the house, but they were unsuccessful. Norman then spoke to petitioner Gregory, and Gregory agreed to help burn down Vogel's house. Norman and Gregory then attempted to burn down the house, but they too were unsuccessful. Finally, Gregory succeeded in burning Vogel's house to the ground. Gov't C.A. Br. 5-6.

2. At trial, petitioners stipulated that at the time of the arson, Vogel's house was connected to interstate gas and telephone lines, the house had been renovated with materials obtained through interstate commerce, the house was subject to a mortgage held by a bank outside South Carolina, the house was being marketed for sale outside South Carolina, the house was under the control of a Bankruptcy Court outside the State, and the house was insured by an out-of-state insurance company. Pet. App. 9. The district court determined that those facts established that Vogel's residence was used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i).

Norman testified for the government pursuant to a plea agreement. He recounted the terms of the conspiracy and the attempts to burn down Vogel's house. On cross-examination, petitioners tried to suggest that Norman was lying about the arson in return for having received a lenient sentence under his plea agreement. In response, the government called two agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) who testified that Norman had previously told them that petitioners had been involved in the arson. When petitioners objected to the testimony, the government explained that the evidence was being offered to

rehabilitate Norman's credibility. The district court admitted the evidence. Gov't C.A. Br. 16-17.

3. The court of appeals affirmed. Pet. App. 1-11. After reciting the stipulated facts bearing on the connection of the Vogel residence to interstate commerce, the court noted that it had held in *United States* v. *Ramey*, 24 F.3d 602 (4th Cir. 1994), petition for cert. pending, No. 94-5755, that the "connection of a house to an interstate power grid constitutes a sufficient use in an activity that affects commerce to satisfy the arson statute." Pet. App. A9. "The government has therefore shown," the court concluded, "that the Vogel residence was used in an activity that affects interstate commerce." *Ibid.*

The court also rejected Gregory's argument that Norman's prior consistent statement to the ATF agents was not admissible because it was made after Norman's alleged motive to fabricate evidence against petitioners arose. Pet. App. A4. The court noted that the prior statement "was made to law enforcement officers after Norman had concluded an arrangement with the government." *Ibid.* It found, however, that "the statement was not offered for the truth of the matter asserted, but to rehabilitate Norman's credibility after it had been impeached." *Id.* at A4-A5. Accordingly, the court concluded that there was "no abuse of the district judge's discretion in admitting Norman's prior consistent statement." *Id.* at A5.

ARGUMENT

1. Petitioners contend (Pet. 7-17) that Vogel's residence was not used in an activity affecting interstate commerce within the meaning of the federal arson statute, 18 U.S.C. 844(i). That contention is without merit.

In *Russell* v. *United States*, 471 U.S. 858 (1985), this Court held that the reference in Section 844(i) to "'any building * * * used * * * in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. Under that standard, the Court concluded that Section 844(i) reaches all business property. *Id.* at 862. The Court did not suggest, however, that Section 844(i) is limited to business property. To the contrary, the Court indicated that Section 844(i) applies to private residences as well, so long as those residences are within the reach of Congress's power to regulate interstate commerce. *Ibid.*

Applying that analysis, the Fourth Circuit held in *United States* v. *Ramey*, *supra*, that a residence that receives electricity from an interstate power grid falls within the scope of Section 844(i). 24 F.3d at 607. The court explained that even though an individual residence may consume only a small amount of energy, "its consumption, combined with that of all similarly situated buildings, has a most definite effect on interstate commerce." *Ibid.* That aggregate effect, the court held, is sufficient to bring the entire class of residences within the reach of Congress's commerce power. *Ibid.*

In *United States* v. *Stillwell*, 900 F.2d 1104, cert. denied, 498 U.S. 838 (1990), the Seventh Circuit reached the same conclusion. Relying on *Russell*, the court held that "Congress intended [Section 844(i)] to cover all properties it has the power to reach under the commerce clause." *Id.* at 1110. The court then held that Congress has power under the Commerce Clause to reach private residences that receive interstate natural gas. *Id.* at 1111. The court explained that "Congress could rationally believe that, in the aggregate, arson of private

residences supplied with interstate natural gas has more than a *de minimis* effect on interstate commerce." *Ibid.*

Since Vogel's residence was connected to interstate gas and telephone lines, this case fits squarely within the rationale of *Ramey* and *Stillwell*. Unlike those cases, however, application of Section 844(i) does not depend on that connection to interstate commerce alone. As the court of appeals in this case noted, there were several additional factors showing that Vogel's residence was used in an activity affecting interstate commerce: the house had been renovated with materials that had moved in interstate commerce, an out-of-state bank held a mortgage on the house, the house was being marketed for sale in several States, the house was being held under the authority of an out-of-state Bankruptcy Court, and the house was insured by an out-of-state insurance company. Pet. App. A9.

The fact that the house was being marketed for sale in several States is particularly significant. In *Russell*, this Court held that "[t]he rental of real estate is unquestionably * * * an activity" that affects interstate commerce within the meaning of Section 844(i). 471 U.S. at 862. The sale of real estate is similarly an activity that unquestionably affects interstate commerce. Indeed, in one respect, this case presents a stronger nexus with interstate commerce than the building in *Russell* because the Vogel house was being marketed on the interstate real estate market, while the apartment building in *Russell* was being rented in a local market. *Ibid.*

Petitioners assert (Pet. 13) that the court's decision in this case conflicts with *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981). That asserted conflict does not warrant this Court's review. In *Mennuti*, the Second Circuit held that Section 844(i) applies only to

residences used for commercial purposes. *Mennuti*, however, was decided before this Court's decision in *Russell* made clear that Section 844(i) also applies to private residences, so long as Congress has the power to reach them under the Commerce Clause. As the court of appeals in *Ramey* explained, "*Russell*'s holding that the full commerce power is exercised in § 844(i) saps *Mennuti* of any vigor." 24 F.3d at 607. See also *Stillwell*, 900 F.2d at 1109 ("We believe the Supreme Court squarely rejected the rationale of *Mennuti* in *Russell*."). The Second Circuit has not revisited the scope of Section 844(i) since *Russell*, and there is no reason to believe that it would adhere to *Mennuti* today.

Petitioners also seek to rely on the Eighth Circuit's decision in *United States* v. *Ryan*, 9 F.3d 660 (1993), but as petitioners note (Pet. 11-12), that decision has been vacated. The Eighth Circuit has now issued its en banc decision in that case. *United States* v. *Ryan*, No. 92-1357 (Oct. 31, 1994). In that decision, the Eighth Circuit held that a district court did not commit plain error in instructing the jury that a temporarily closed commercial rental property that receives natural gas from outside the State falls within the scope of Section 844(i). Slip op. 11-12. Because the court reviewed the district court's instruction under the plain error standard, the court had no occasion to decide the precise scope of Section 844(i), even in the context of commercial property. *Id.* at 12. And because *Ryan* involved commercial property, it did not address the circumstances in which a private residence would be covered by Section 844(i). *Id.* at 8, 12. *Ryan* is therefore not instructive here.

2. Petitioners contend (Pet. 17-18) that the district court erred in admitting Norman's prior consistent statement implicating them in the arson because the statement was made after Norman's alleged motive to lie

arose. The question whether prior consistent statements offered as substantive evidence to rebut a charge of improper motive may be admitted pursuant to Fed. R. Evid. 801(d)(1)(B) without a showing that the statements were made before the motive to fabricate arose is currently before the Court in *Tome* v. *United States*, No. 93-6892 (argued Oct. 5, 1994).*

That question is not presented here, however, because Norman's prior consistent statement was offered to rehabilitate his credibility, not as substantive evidence. See Pet. App. 4-5. As petitioners concede (Pet. 18), every circuit that has adopted the pre-motive rule has also held that it does not apply where (as here) the prior consistent statement is admitted to rehabilitate a witness's credibility, rather than as substantive evidence. See *United States* v. *Casoni*, 950 F.2d 893, 905-906 (3d Cir. 1991); *United States* v. *DeMarrias*, 876 F.2d 674, 678 (8th Cir. 1989); *United States* v. *Brennan*, 798 F.2d 581, 587-588 (2d Cir. 1986); *United States* v. *Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985); *United States* v. *Parodi*, 703 F.2d 768, 784-785 (4th Cir. 1983). Those decisions reason that a prior consistent statement offered for rehabilitation does not implicate the hearsay rule because it is not being offered for the truth of the matter asserted in the statement. See Fed. R. Evid. 801(c). Thus, the statement need not be admitted under Rule 801(d)(1)(B). Instead, such a statement is admissible if it is relevant to

---

* As we argued in our brief in *Tome*, Rule 801(d)(1)(B) does not contain a "pre-motive" requirement. The language of the Rule says nothing about the timing of the statement as a prerequisite to its admissibility, and a pre-motive rule would be inconsistent with the basic philosophy underlying the Federal Rules of Evidence, which is to permit the trier of fact to consider all relevant evidence. We are providing petitioners with a copy of our brief in *Tome*.

rehabilitate the witness's credibility. Fed. R. Evid. 402. See, *e.g.*, *Brennan*, 798 F.2d at 588 ("[A] prior consistent statement may be used for rehabilitation when the statement has a probative force bearing on credibility beyond merely showing repetition.").

Petitioners argue (Pet. 18-21) that those decisions conflict with *United States* v. *Miller*, 874 F.2d 1255, 1272-1273 (9th Cir. 1989), which rejected a distinction between statements offered as substantive evidence and statements offered for purposes of rehabilitation. But *Miller* also rejected a pre-motive rule. *Id.* at 1273-1274. Under *Miller*, the timing of the statement is "simply one of several factors to be considered in determining relevancy." *Id.* at 1274. *Miller* therefore provides no support for petitioners' claim that Norman's prior statement should have been excluded because it was made after Norman's motive to lie arose.

Petitioners argue (Pet. 21-23) that they should prevail even under the more flexible relevancy standard adopted in *Miller*. Petitioners, however, did not make that argument in the court of appeals. Petitioners' sole contention was that Norman's prior statement was inadmissible because it was made after the motive to fabricate arose. Appellants' C.A. Br. 14-16. The question whether the statement is admissible under the more flexible *Miller* standard is therefore not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). Moreover, since the resolution of that question is fact-bound and would affect only the parties to this case, it does not warrant this Court's review in any event.

Nor is there any need to hold this petition pending resolution of the issue presented in *Tome*. Even if this Court were to decide in *Tome* that Rule 801(d)(1)(B) contains a pre-motive requirement, it would not affect

the outcome in this case. Consistent with the courts of appeals that have found a pre-motive requirement in the Rule, the court below held that a prior consistent statement, if relevant, is admissible apart from the Rule to rehabilitate a witness whose credibility has been impeached. As we noted in our brief in *Tome* (Br. 45 n.24), the Court's resolution of the pre-motive issue should not affect that principle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

JANUARY 1995